

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Legend

Plan =

City =

State =

Dear :

This responds to a letter dated October 6, 2008, and subsequent correspondence, submitted on behalf of City and its Plan by your authorized representative, requesting a ruling concerning the Plan relating to City's volunteer firefighters' and rescue squad workers' service award program which City intends to be a length of service award plan described in section 457(e)(11)(B) of the Internal Revenue Code of 1986. City has represented that it is an eligible employer as described in section 457(e)(1).

City has established the program reflected in the Plan to provide retirement and death benefits to long-term eligible Volunteers (as defined in the Plan) providing qualifying services to the City's fire department and rescue service, as provided in the Plan. Under the Plan, benefits are only provided to eligible Volunteers who provide fire fighting, fire prevention, emergency medical services, ambulance services, and/or related essential services for the City, and who do not receive compensation for such services except for the reimbursement of reasonable expenses incurred while performing such services, reasonable benefits and nominal fees for such services. An eligible Volunteer will become a participant under the Plan immediately when he or she becomes a Volunteer for the City. The Plan is established to provide length of service awards in the amounts and at the time determined under the Plan to eligible Volunteers.

If a participant in the Plan has a Severance from Employment with a Vested Account (as defined in the Plan) the participant shall be paid an amount equal to his or her Vested Account balance, in a single lump sum payment by March 1 of the calendar year after the participant's Severance from Employment. If a participant has a Severance from Employment without a Vested Account balance under the Plan, the participant shall forfeit his/her account balance and have no benefit due under the Plan. In addition, his or her years of credited service shall be cancelled; provided, however, that if the individual again becomes a participant in the Plan, his or her credited service shall be restored, but not any forfeited account balance.

The City is required to make annual contributions to a fund set up by the Plan (the "Fund"). Also, in addition to the City's annual contribution, as soon as administratively practicable in 2009, the City will make a one-time contribution to the Plan for each active Volunteer, as provided in section 2.03 of the Plan. The Plan provides that the total Fund contribution made with respect to an individual member may not exceed \$ 3,000 for any year of service credit. The Plan provides that all amounts under the Plan in the Fund and all income attributable to such amounts will remain (until made available to the participant or beneficiary) solely the property and rights of the City, subject only to the claims of the City's general creditors. The Plan also provides that a participant or beneficiary has only an unsecured right to benefits under the Plan. The rights of any participant or beneficiary to payments under the Plan are nonassignable and nontransferable.

LAW AND ANALYSIS

Section 451(a) and section 1.451-1(a) provide that generally an item of gross income is includible in gross income for the taxable year in which it is actually or constructively received by a cash basis taxpayer. Section 1.451-2(a) provides that income is constructively received in the taxable year during which it is credited to the taxpayer's account, set apart, or otherwise made available so that the taxpayer may draw on it at any time. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

Rev. Rul. 60-31, 1960-1 C.B. 174, holds that a mere promise by the service recipient to pay the service provider, not represented by notes or secured in any way, does not constitute receipt of income within the meaning of the cash receipts and disbursements method of accounting. See also, Rev. Rul. 69- 650, 1969-2 C.B. 106, and Rev. Rul. 69-649, 1969-2 C.B. 106.

Section 457 governs the taxation of deferred compensation plans of eligible employers. The term "eligible employer" is defined in section 457(e)(1) as a state, political subdivision of a state, and any agency or instrumentality of a state or political

subdivision of a state, and any other organization (other than a governmental unit) exempt from tax under subtitle A of the Code. Deferred compensation plans maintained by eligible employers to which section 457 applies are either eligible plans or ineligible plans. An "eligible deferred compensation plan," as defined in section 457(b), must, among other things, provide that the maximum amount which may be deferred under the plan for a taxable year will not exceed the lesser of the "applicable dollar amount", as defined in section 457(e)(15) or 100 percent of the participant's includible compensation. Section 457(a)(1) provides that compensation (and income attributable to such compensation) deferred under an eligible deferred compensation plan maintained by a political subdivision of a State is includible in a participant's gross income in the taxable year in which the compensation (and income attributable to such compensation) is paid to the participant.

Section 457(f)(1)(A) provides that generally if a plan of an eligible employer providing for a deferral of compensation is not an eligible deferred compensation plan, compensation deferred under such plan is included in the participant's gross income for the first taxable year in which there is no substantial risk of forfeiture of the rights to such compensation.

Section 457(e)(11)(A)(ii) provides that a plan paying solely length of service awards to bona fide volunteers or their beneficiaries on account of qualified services performed by such volunteers is treated as not providing for the deferral of compensation under section 457. Section 457(e)(11)(C) defines qualified services as fire fighting and prevention services, emergency medical services, and ambulance services.

Section 457(e)(11)(B) provides special rules applicable to a length of service award plan. Section 457(e)(11)(B)(i) defines a bona fide volunteer to include only persons whose only compensation received for performing qualified services are reimbursements for (or reasonable allowances for) reasonable expenses incurred in performing such services or reasonable benefits (including length of service awards) and nominal fees for such services, customarily paid by eligible employers in connection with the performance of such services by volunteers.

Section 457(e)(11)(B)(ii) provides that a length of service award plan may not provide for an aggregate amount of length of service awards exceeding \$ 3,000 accruing with respect to any year of service by any volunteer.

The Plan established by City and its fire department satisfies the requirements of section 457(e)(11)(A)(ii). The Plan applies only to volunteers who provide qualified services, i.e., fire fighting and prevention services, emergency medical services, ambulance services, or other related essential services in compliance with section 457(e)(11)(C). The Plan also satisfies section 457(e)(11)(B)(i) by limiting eligible volunteers to persons who receive reimbursements, reasonable expenses, nominal

fees, or reasonable benefits customarily paid by eligible employers in connection with the performance of qualified services by volunteers. Finally, the Plan satisfies section 457(e)(11)(B)(ii) by limiting the aggregate amount of awards for any year of service to \$ 3,000.

Since the Plan qualifies as a length of service award plan under section 457(e)(11)(A)(ii), neither section 457(a) nor section 457(f) apply to benefits under the Plan. Instead, amounts distributable under the Plan are includible in gross income under section 451 and the regulations thereunder, when paid or made available without substantial limitation or restriction.

Section 3121(a)(5)(I) provides that any payment made to, or on behalf of, an employee or his beneficiary under a plan described in section 457(e)(11)(A)(ii) and maintained by an eligible employer as defined in section 457(e)(1) is not treated as wages for purposes of determining whether Federal Insurance Contribution Act (FICA) taxes apply to such payment.

In light of the original documents and information presented on October 6, 2008, including the relevant State statutory provisions, the proposed amendments to the Plan submitted on November 17, 2008, February 28, 2008 and March 20, 2009 (which it is represented will be adopted by City) and the other representations made, we conclude as follows:

(1) The Plan is a length of service award plan within the meaning of Code Section 457(e)(11)(A)(ii) and the regulations thereunder and, as such, the Plan is not otherwise subject to section 457(b) or (f);

(2) Amounts paid to participants or their beneficiaries are includible in the participant's gross income only in the taxable year in which such amounts are paid or made available, pursuant to Code section 451; and

(3) Benefits under the Plan paid to participants or their beneficiaries are not treated as "wages" for purposes of FICA taxes.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. If the Plan is significantly modified, this ruling will not necessarily remain applicable.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

John T. Ricotta
Chief, Qualified Plans Branch 2 (Employee
Benefits)(Tax Exempt & Government Entities)

Enclosure (1)